BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TRAVIS BOTKIN	)	
Claimant	)	
	)	
VS.	)	
	)	
SAUDER CUSTOM FABRICATION, INC.	)	
Respondent	)	Docket No. 1,050,727
	)	
AND	)	
	)	
SENTINEL INSURANCE CO. LTD.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 8, 2012, Post Award Order entered by Administrative Law Judge Brad E. Avery. Judy A. Pope, of Leawood, Kansas, appeared for claimant. Timothy A. Emerson, of Overland Park, Kansas, appeared for respondent. This claim was placed on the Board's summary calendar for determination without oral argument.

The Administrative Law Judge (ALJ) found that respondent was barred by res judicata from relitigating the issue of whether claimant was entitled to post award medical benefits for his hernia after claimant and respondent signed an agreed order to provide a doctor. The ALJ further found that claimant's need for medical treatment stemmed from his previous injury of July 2009. Accordingly, the ALJ ordered respondent to pay claimant's medical bills and medical mileage, as well as unauthorized medical per exhibit 3 of the deposition of Dr. William Hopkins.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the Post-Award Hearing held September 29, 2011, and exhibits; the deposition of Dawn Jacoby taken December 12, 2011; the deposition of William O. Hopkins taken December 16, 2011, with exhibits; the deposition of Vito J. Carabetta, M.D., taken February

15, 2012, with exhibits, and the transcript of the settlement hearing held August 10, 2010, and attachments, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the agreed order of March 3, 2011, simply states that Dr. Carabetta would remain the authorized treating physician and did not modify the basis of the settlement. Respondent argues the agreed order should not be treated as an original award and that it is not precluded by res judicata from relitigating the issue of whether claimant was entitled to post award medical benefits for his hernia. Respondent asserts claimant's underlying claim was for an injury to his back, and he is not entitled to post-award benefits for a hernia. In the alternative, respondent contends that claimant's hernia injury was not related to the subject of his underlying workers compensation award.

Claimant asks the Board to affirm the Post Award Order of the ALJ, arguing claimant's medical benefits were left open when his workers compensation claim was settled on August 10, 2010. Claimant further notes that on March 3, 2011, the parties agreed to a Post Award Order wherein Dr. Vito Carabetta and his referrals were authorized to evaluate and treat claimant's work-related injuries. Claimant argues the evidence is clear that claimant's hernia was caused by his lifting injury at work.

The issues for the Board's review are:

(1) Is claimant or respondent precluded by res judicata from litigating the issue of whether claimant was entitled to post award medical benefits for his hernia?

(2) If not, did claimant meet his burden of proving his hernia injury was causally related to the accident which was the basis for his underlying workers compensation award?

FINDINGS OF FACT

On July 10, 2009, while working for respondent, claimant was injured when he tried to lift a steel plate from the floor. When attempting the lift, claimant felt immediate pain in his back that was shooting around into his right testicle.[1] Claimant was first seen by Leighton York, ARNP. He said he described his pain to Mr. York, and Mr. York thought claimant was having pain from his sacroiliac joint. Claimant was placed in physical therapy, but the pain did not go away. Claimant was then sent to Dr. Vito Carabetta. Claimant also told Dr. Carabettta that his pain went from the back to the front and he was

[1] PAH Trans. at 7.

having issues in his groin area on the right side. Claimant said Dr. Carabetta administered three shots in his back during a three-month period.[2] When that did not help, claimant said Dr. Carabetta told him he would have to live with the pain.[3]

Claimant settled his claim on August 10, 2010, based upon a 50 percent work disability. Future medical was left open. Dr. Carabetta had diagnosed claimant with right-sided sacroiliitis and, using the AMA *Guides*,[4] had placed claimant in DRE Lumbosacral Category II for a 5 percent impairment to the body as a whole.

At some point in early 2011, claimant went to see his personal physician, Dr. Diane Kimball, about the pain in his groin. Dr. Kimball told claimant she thought he had a hernia. On January 24, 2011, claimant filed an Application for Post Award Medical requesting "[e]valuation and treatment of ongoing pain in Claimant's back, radiating into his hip and groin."[5] On March 3, 2011, the ALJ signed an agreed Post Award Order indicating that Dr. Vito Carabetta is to remain claimant's authorized treating physician for treatment, tests and referrals. Claimant saw Dr. Carabetta on March 28, 2011. Dr. Carabetta's report of that date indicates:

> [I]t is indeed possible that his groin area symptoms may not be a radiation of the complaints stemming from the sacroiliac joint, but rather a possible inguinal hernia on the right side that went undetected, and may very well have its roots in an industrial injury.[6]

Dr. Carabetta ordered an ultrasound of claimant's abdominal region, which showed that claimant had a right inguinal hernia. Dr. Carabetta referred claimant to Dr. Craig Anderson. Dr. Anderson performed hernia repair on claimant on May 2, 2011. Respondent has denied that claimant's hernia was causally connected to the July 10, 2009, work-related accident.

Claimant testified that after his July 10, 2009, accident, he was first seen by Leighton York, a nurse practitioner, who sent him to physical therapy. He was then referred to Dr. Carabetta for treatment. In September 2009, claimant was seen by Dr.

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[2] PAH Trans. at 8.

[3] PAH Trans. at 9.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[5] Form K-WC E-4, Application for Post Award Medical filed January 24, 2011.

[6] Carabetta Depo., Ex. 2 at 1.

John Ciccarelli for a surgery consult. Claimant testified he told all his medical providers that his pain went from his low back to the front and that he was having issues in his groin on the right side. He said none of the four medical providers suggested he might have a hernia, but all of them only diagnosed him with sacroiliitis. It was only when he saw his personal physician did anyone suggest he might have a hernia.

Claimant's girlfriend, Dawn Jacoby, testified that she went with claimant to all but one of his doctor's appointments relating to the accident. She corroborated claimant's testimony that he reported the problems with his groin to all the medical providers he saw.

Dr. Carabetta testified that he first saw claimant on October 13, 2009, and claimant was complaining of sharp pain in his right lower back almost into the buttock area. Claimant had no radiating pain. Dr. Carabetta prepared a pain diagram based on claimant's complaints, and it does not show that claimant complained about pain in his groin area. Dr. Carabetta saw claimant a total of eight times from October 13, 2009, through April 10, 2010, and none of those records reflect a complaint of groin pain.

Dr. Carabetta testified that claimant's mechanism of injury, lifting 300 to 400 pounds, was significant and could cause someone to develop an inguinal hernia as well as an injury to the back. He also stated that claimant could have had a small hernia that did not bother him but then spread. Dr. Carabetta said that if claimant had voiced a concern about the hernia sooner after the accident, he would have opined that the accident caused the inguinal hernia. Further, he stated: "Absent any other mechanism thereafter, it's probably going to be the leading source."[7] Dr. Carabetta is not aware of any other accident that could have caused claimant's hernia.

Dr. William Hopkins, a board certified orthopedic surgeon, examined claimant on October 31, 2011, at the request of claimant's attorney. He reviewed medical records from August 14, 2009, through Dr. Carabetta's report of March 28, 2011. Claimant gave a history of having worked for respondent and injuring his low back. Claimant said as a result of the lifting incident, he experienced back pain, groin pain and leg pain. Claimant told him he had immediate onset of groin pain after the accident.

Dr. Hopkins believed there were two causative factors for claimant's groin pain. First, claimant had a right inguinal hernia with no prior indication of abnormality in that area. In addition, Dr. Hopkins believed some of claimant's groin pain may have been generated from his lumbar injury. Claimant's hernia had been repaired before Dr. Hopkins saw claimant, and at the time of the examination claimant's major complaint was low back pain.

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[7] *Id*. at 19.

It was Dr. Hopkins' understanding that claimant's groin complaints improved following the hernia repair.

After reviewing the medical records, taking a history, and performing a physical examination, Dr. Hopkins opined that as a result of the work-related accident claimant suffered an injury to his low back and also a right inguinal hernia. Dr. Hopkins stated that claimant's need for an operative repair of a right inguinal hernia is causally related to his lifting injury of July 10, 2009. Further, he stated if an inguinal hernia is related to heavy lifting, the symptoms could be acute or could have a gradual onset. Dr. Hopkins acknowledged that some inguinal hernias have no apparent cause.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2009 Supp. 44-510k(a) states:

> At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right

depends.[8] In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve or cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.[9]

Estoppel exists when a party, by its acts, representations, admissions or silence, induces another party to believe certain facts existed upon which the other party detrimentally relies.[10] The doctrine of equitable estoppel is applicable to workers compensation.[11]

In *Marley*,[12] the Kansas Court of Appeals held:

> The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.

K.S.A. 44-526 states:

> Any award of compensation may be modified by subsequent written agreement of the parties, but no such agreement modifying an award shall be valid as against the workman unless such agreement or a copy thereof be filed by the employer in the office of the director within sixty (60) days after the execution of such agreement.

ANALYSIS

The procedural history of this case is important. At the hearing conducted on August 10, 2010, the parties presented their terms for the settlement of this claim by a running award for compensation based upon a 50 percent permanent partial disability. The worksheet for settlement provided: "This award is subject to review and

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[8] K.S.A. 2009 Supp. 44-501(a).

[9] K.S.A. 2009 Supp. 44-510k(a).

[10] *Turon State Bank v. Bozarth*, 235 Kan. 786, Syl. ¶ 2, 684 P.2d 419 (1984).

[11] See *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d 156, 928 P.2d 109 (1996).

[12] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, Syl. ¶ 1, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

modification."[13] This right to review and modification was reiterated by respondent's counsel at the hearing before the Special Administrative Law Judge (SALJ): "Following the end of today's settlement hearing this award is subject to review and modification . . . ."[14] Counsel for claimant clarified that the agreement left open claimant's right to seek future medical benefits.

> MS. POPE [Claimant's attorney]: Right. And then the only other thing is it's a little unclear in the language of your worksheet so I want to just state for the record our understanding that future medical and all future benefits will be left open?
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> MR. [DUMM] [Respondent's attorney]: That is correct.[15]

Based on claimant's testimony and the statements of counsel, the SALJ approved the terms of the settlement and entered an award as agreed to by the parties. The settlement award placed no limitations on that future medical treatment. Of course, such treatment must be related to the work injury.

Thereafter, on January 24, 2011, claimant filed an Application for Post Award Medical requesting "[e]valuation and treatment of ongoing pain in Claimant's back, radiating into his hip and **groin**." (Emphasis added.)[16] A hearing on claimant's motion was scheduled for hearing before Judge Avery on March 4, 2011. However, on March 3, 2011, the parties entered into an agreed Post Award Order that was presented to and approved by Judge Avery on that same date. It provided that the parties "agree to the following":[17]

> Dr. Vito Carabetta is to remain as the authorized treating physician for all treatment, tests and referrals except referral to rehabilitation hospitals. Any change to Dr. Carabetta's authorization must be approved by the Court.[18]

Claimant was examined by Dr. Carabetta on March 28, 2011, and he issued a report to Judge Avery that same day with copies to counsel. The report stated in part:

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[13] Worksheet for Settlements at 1 (attached to SH Trans. Aug. 10, 2010).

[14] SH Trans. (Aug. 10, 2010) at 4.

[15] *Id.* at 5. The transcript of the Settlement Hearing misidentified respondent's attorney as Mr. Fincher.

[16] Form K-WC E-4, Application for Post Award Medical filed January 24, 2011.

[17] ALJ Post Award Order (March 3, 2011).

[18] *Id.*

> However, it is indeed possible that his groin area symptoms may not be a radiation of the complaints stemming from the sacroiliac joint, but rather a possible inguinal hernia on the right side that went undetected, and may very well have its roots in an industrial injury.
>
> . . . .
>
> At this point I would advise proceeding with an ultrasound of the abdominal region for the right lower quadrant to verify that a hernia is not detected. However, there is no replacement for clinical expertise. Consequently, I would advise an evaluation by a general surgery specialist. This should help create a direction in terms of treatment. I will plan to follow up with him in about a month.[19]

Respondent made no objection to Dr. Carabetta's referral of claimant for tests and to a general surgeon for a clinical evaluation to verify a hernia. Respondent did not file any motion or seek a hearing before Judge Avery to modify or amend the agreed Post Award Order of March 3, 2011. Consequently, Dr. Carabetta and his referrals remained the authorized treating physicians. As such, the subsequent evaluations and treatment for the hernia were authorized medical treatment, and respondent is responsible for paying for those treatment expenses.

The post award proceeding that was resolved by the agreed order of March 3, 2011, was not a preliminary hearing. It was a final order, and the causation of the treatment provided pursuant to that order cannot be relitigated after the fact. If there was a question about whether the treatment Dr. Carabetta or his referrals was providing to claimant was authorized, reasonable or related, the time for questioning that treatment was before, not after, it was provided. Respondent did nothing to disabuse claimant or the physicians of their belief that the treatment was authorized. Respondent did not seek a hearing to clarify or limit the agreed order. The ALJ held that res judicata precluded respondent from disputing the compensability of the medical treatment. It could also be argued that claimant relied upon respondent's silence to his detriment by contracting for medical treatment services, and respondent should be estopped from denying its authorization of the treatment.

In any event, the overwhelming weight of the evidence is that claimant's hernia condition is causally related to and his need for treatment is a natural consequence of the work accident.

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[19] Report of Dr. Carabetta to ALJ filed with Division on April 1, 2011, at 1-2.

CONCLUSION

(1) The agreed Post Award Order of March 3, 2011, covers the medical treatment claimant received for his hernia. Respondent is liable for paying those expenses as authorized treatment.

(2) Claimant has met his burden of proving that the hernia was causally related to the work-related accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Order of Administrative Law Judge Brad E. Avery dated March 8, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge